IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO. 30 OF 2005

(1)M/s. Maha Seer Hotels and Resorts (P) Ltd., having its registered Office at No.2, Kasturba Gandhi Marg, New Delhi – 110 001.

(2)Shri Fateh Singh Akoi, Director, M/s. Maha Seer Hotels and Resorts (P) Ltd. No.2, Kasturba Gandhi Marg, New Delhi – 110 001, presently residing at C-24, Ondas Do Mar, Holiday Street, Guarawado, Calangute, Bardez, Goa. ..... Appellants.

V/s.

(1)M/s. Indana International Ltd., Registered Office at 72, Janpath, New Delhi – 110 001.

(2)M/s. Foremost Industries (India) Ltd., Registered Office at 138-141, Industrial Estate, Kandivli (West), Mumbai – 400 067.

(3)M/s. Wisdom Investments Ltd., Registered Office at 72, Janpath, New Delhi – 110 001.

(4)M/s. Silverline Properties Ltd., Registered Office at 72, Janpath, New Delhi – 110 001.

(5)Shri Mario Vasco George, major in age, resident of Reis Magos, Verem, Bardez, Goa.

(6)Smt. Silvia Afonso e George, w/o. Shri Mario Vasco George,

major in age, resident of
Reis Magos, Verem, Bardez, Goa.

(7)Shri Norman William de Carvalho
George alias Norman George,
S/o. Shri Mario Vasco George,
major in age, resident of
Reis Magos, Verem, Bardez, Goa. ..... Respondents.

Mr. M.S. Sonak, Advocate for the appellants.

Mr. P.P. Singh with Mr. Tony George, Advocates for respondents No.1 to 4.

CORAM : S.S. PARKAR, J.

DATE : 7TH JULY, 2005.

ORAL ORDER :

Heard both sides at length.

2. This appeal is filed impugning the Order dated 6th June, 2005 passed by the Civil Judge, Sr. Division, at Mapusa, dismissing the application filed by the appellants under Order 39, Rule 4 of C.P.C. This appeal is filed in the following circumstances :

The plaintiffs filed the suit in the trial Court for injunction against defendant Nos. 1, 2 and 3, the owners of the suit land and defendant Nos.4 and 5 who claim to have purchased the property from defendant Nos.1 to 3. The suit is also for a declaration that the sale

deed dated 25.8.2004 executed by defendant Nos.1 to 3 is null and void and illegal and moved an application for interim injunction, restraining the defendants from doing any construction activities on the suit land. Direction is also sought against the Survey Authorities not to entertain any application filed by the defendant Nos. 4 and 5 i.e. the appellants herein for mutation. The suit was filed on 12.1.2005 and an interim application was filed for injunction. The trial Court passed an ex parte ad interim Order on 13.1.2005, which is as follows :

> " Heard ld. Advocate P.P. Singh on behalf of the plaintiffs. Perused the records. I am satisfied that if notice is made condition precedent, the very purpose of the suit vis a vis application for temporary injunction would be infructuous. Hence, till the application for temporary injunction is decided on merits, the defendant nos. 4 and 5 shall not go for mutation in respect of the suit property/property marked "J", "G" and "C" in plot has "A" and "B" called as SACRI (SACRO) BOROD bearing survey Nos. 211/2, 210 and 212 till further orders of this Court. Issue show cause notices to the defendants r/o. 10.2.2005 at 2.30 p.m."

After this order was passed, the respondents/plaintiffs took some time to serve copies of the injunction order on the defendants/appellants. It appears that the summons and the injunction order were served on the defendants on 28.2.2005. Thereafter, the appellants filed an

application on 3rd March, 2005, under Order 39, Rule 4 of C.P.C. for vacating the ex-parte injunction order, which application came to be disposed of by the impugned Order dated 6th June, 2005.

3. The learned Counsel appearing for the appellants contends that the ex parte order was passed in contravention of Rule 3 of Order 39 of C.P.C. and also in contravention of Rule 3-A of Order 39 and, therefore, the said order should be quashed by this Court. Secondly, it is contended by the learned Counsel for the appellants that the application filed by the appellants under Order 39, Rule 4 of C.P.C. has been wrongly dismissed by the trial Court and, therefore, the impugned order should be set aside. In support of the said contentions, the learned Counsel for the appellants has relied on some Judgments of the Apex Court and of the various High Courts, including this Court.

4. As against that, the learned Advocate Mr. Singh, appearing for the respondents-original plaintiffs contended that the application made by the appellants under Order 39, Rule 4 of C.P.C. was rightly dismissed, as no case was made out for vacating the ex-parte injunction order passed by the trial Court, which is only an ad interim order passed on 13.1.2005, which was passed by the trial Court after the Court was satisfied that prima facie case was made out by the plaintiffs for injunction.

5. In order to appreciate the submissions made by either side, it would be relevant to state some more facts of the case. Though the injunction order was served along with the requisite documents on the appellants on 28.2.2005 and though the application was made by the appellants on 3.3.2005 for vacating the ad interim ex parte order of injunction on the technical grounds i.e. for non-compliance of the provisions of Order 39, Rule 3 and 3-A of C.P.C., the reply to the application for temporary injunction was filed as late as on 6th June, 2005. Even, the written statement was filed belatedly after a period of 70 days and, therefore, the plaintiffs objected to the filing of the written statement after expiry of the period, without having applied for extension of time within a period of 30 days and the said application is still pending the decision of the trial Court which is fixed for hearing tomorrow i.e. 8.7.2005. It is submitted on behalf of the plaintiffs/respondents that unless and until that application for objection is considered and decided in favour of the defendants/appellants by the trial Court and the appellants are allowed to file the written statement, they will have no right to defend the suit and/or oppose the application for temporary injunction, pending the disposal of the suit.

6. The learned Counsel appearing for the appellants firstly contended that the provisions of Order 39, Rules 3 and 3-A being

mandatory, the application made by the appellants under Order 39, Rule 4 of C.P.C. ought to have been allowed. Rule 3 of Order 39 mandates that before granting the ex-parte injunction, the Court should direct notice to opposite party, except where it appears that the object of granting the injunction would be defeated by the delay, in which case, the Court shall record its reasons and direct notice of the application to be given to the opposite party by registered post, along with the copies of the application for injunction and the documents relied on, immediately after the order is passed by the trial Court. A number of Judgments have been cited of various High Courts, including this Court and the Supreme Court holding that the Court should comply with the said mandate strictly. A perusal of the order, which is quoted above, leaves no doubt in my mind that before passing of the ex parte injunction order, the trial Court has applied its mind by perusing the records and after being satisfied that if notice was made condition precedent, the very purpose of the suit and the application for temporary injunction would be defeated. The injunction which has been granted against the defendant Nos. 4 and 5 i.e. the present appellants is that they should not go for mutation in respect of the suit property, till further orders are passed by the Court. The show cause notice was issued to the defendants, which was made returnable on 10.2.2005. Thus, so far as the trial Court is concerned, there is no non-compliance with the provisions of Rule 3, Order 39 of C.P.C. The said provision specifically requires the

plaintiffs to deliver copies of the plaint, application, affidavit filed in support of the application, and the copies of the documents on which the applicant relies. But, it is not the case of the appellants that when they were served, though belatedly by the plaintiffs with the order of injunction and the show cause notice, requisite documents were not supplied to them.

7. The second objection raised on behalf of the appellants is that there was no compliance of Rule 3-A of Order 39, whereby the Court is required to **make an endeavour** to finally dispose of the application within 30 days from the date on which the ex parte injunction was granted and where it is unable to do so, it shall record its reasons for its inability. I do not think that there is any non-compliance with the said provision because the Court is required to make an endeavour to finally dispose of the application within 30 days. A perusal of the record of the case does not give any impression that the trial Court had failed in its duty to comply with this provision. Though the notice was served along with the documents on the defendants on 28.2.2005, it is not disputed that the reply to the said application was filed as late as on 6th June, 2005. If the trial Court has to comply with Rule 3, Order 39, it could dispose of the application only after the reply was filed by the appellants as soon as they were served with the notice of injunction order. How there could be any default on the part of the trial Court in disposing of

the said application finally when no reply to the said application was filed ? What the appellants wanted was that the trial Court should have dismissed the application for injunction purely on technical grounds as if they had no case on merits for not disposing of the injunction application within 30 days from the date when it was initially granted. No doubt, there was delay on the part of the plaintiffs to serve the defendants with the order of injunction, but for that lapse on the part of the plaintiffs, it is only the plaintiffs who could have suffered the consequences without deriving any advantage from the late service of the injunction order on the appellants/defendants, because, unless and until the injunction order was served on the appellants, they had no obligation to comply with the injunction order and they could have very well in the meantime proceeded with the application for mutation, filed by them with the Revenue Authorities.

8. The next submission made on behalf of the appellants is that when there was non-compliance with the mandatory provisions of Rules 3 and 3-A of Order 39, the application made under Order 39, Rule 4 ought to have been allowed and not dismissed. Rule 4 empowers the trial Court to discharge, vary or set aside any order on the application of the party dissatisfied with such order. This provision is made for the benefit of the defendant against whom an ex parte order of injunction is obtained by the plaintiff, like the present appellants as the wording of the said provision shows that either of

the party dissatisfied with the passing of the ex parte order, or on merits, on bringing to the notice of the trial Court, the Court should be persuaded on merits to hold that there was no case for passing the ex parte injunction order against the defendant. As pointed out hereinabove, there is no non-compliance with the mandatory provisions of Rule 3 and 3-A of Order 39 and, therefore, the only course open for the trial Court was to consider the application made under Order 39(4) on merits. But from the perusal of the impugned Order, it is quite clear that the defendant did not choose to challenge the ex parte order on merits, but only on technical grounds, as was done in this Court before me saying so expressly and all the Judgments which are cited before me are in regard to the non-compliance with the mandatory provisions of Rules 3 and 3-A of Order 39. In view of what I have stated hereinabove, it is not necessary to deal with all the Judgments cited before me on behalf of the appellants, but it may be relevant to refer to some of them to show that the order was challenged on the technical grounds only and the two provisos to Rule 4, Order 39 are not applicable to this case, as very rightly conceded by the learned Counsel for the appellants.

9. Much emphasis has been laid on the observations of the Supreme Court in the case of **A. Venkatasubbiah Naidu vs. S. Chellappan and ors.** ((2000) 7 SCC 695) in which it has been

observed by the Supreme Court that the trial Court cannot bypass the two statutory obligations cast on the Court, while passing the ex parte order of injunction i.e. of giving notice in very exceptional contingency and secondly to dispose of the application finally within a period of 30 days. I have already pointed out that the reasons have been given by the trial Court and it could not have disposed of the application finally, firstly because the service was not effected and secondly, even after service was effected on the appellants, they had chosen not to file reply until 6th June, 2005. Instead of filing the reply to the said application, the appellants/defendants had filed an application for vacating the injunction order under Order 39 (4) of C.P.C. Neither it is argued nor it is brought on record that the plaintiffs had deliberately or without any reasons not chosen to serve the injunction order on the defendants/appellants, after it was granted on 13.2.2005. As stated earlier, if at all, it would have been the plaintiffs who would have suffered the consequences of not serving the injunction order on the defendants. The delay in service of the injunction order on the defendants/appellants has not caused any prejudice or resulted in any injustice to the defendants/appellants. It is pertinent to point out that in the aforesaid Judgment of the Supreme Court, in **A. Venkatasubbiah Naidu's case**, the Supreme Court after pointing out the obligatory nature of the provisions of Rules 3 and 3-A of Order 39, with regard to exercise of the power by the High Court under Article 227 of the Constitution has observed in paragraph

22 of the Judgment as follows :

> " Now what remains is the question whether the High Court should have entertained the petition under Article 227 of the Constitution when the party had two other alternative remedies. Though no hurdle can be put against the exercise of the constitutional powers of the High Court it is a well-recognized principle which gained judicial recognition that High Court should direct the party to avail himself of such remedies one or the other before he resorts to a constitutional remedy. Learned Single Judge need not have entertained the revision petition at all and the party affected by the interim ex parte order should have been directed to resort to one of the other remedies. Be that as it may, now it is idle to embark on that aspect as the High Court had chosen to entertain the revision petition."

That was a case where the defendant had challenged passing of the ex parte injunction order against him. The Supreme Court directed hearing of the application finally by the trial Court and observed that the High Court ought not to have entertained the revision petition at all and the party affected should have been directed to resort to the remedy available under the law and ultimately, the Supreme Court itself directed the trial Court to pass final orders on the interlocutory application filed by the plaintiff in accordance with law.

9. Secondly, reference may be made to the Judgment of the Division Bench of this Court in the case of **Sopan Maruti Thopte and another etc. etc. vs. Pune Municipal Corporation and another** (AIR 1996 BOMBAY 304) which was cited on behalf of the appellants. That was a case where the Division Bench held that the injunction orders should not be granted for mere asking, and which should not be passed, resulting in grant of ad interim orders against the State or local bodies to protect illegality already committed by the plaintiff, which is not the case here.

10. Next, reliance was placed on the Division Bench of this Court is on the case of **Nagorao and ors. vs. The Nagpur Improvement Trust and others,** (AIR 2001 BOMBAY 402). In that case, the Division Bench was considering the scope of Order 39, Rule 3 of C.P.C. It is observed by the Division Bench that the order of status quo was passed though it was found that prima facie case was not made out. In the present case, the trial Court was satisfied that order of ex parte injunction was required to be passed otherwise the very purpose of the suit and the application for temporary injunction would be infructuous.

11. Reliance was also placed on the Judgment of the Gujarat

High Court in the case of **P. Chidambaram , General Secretary, Gujarat Mazoor Panchayat and others vs. Joint Civil Judge (J.D.), Narol, Ahmedabad and ors.** (AIR 1986 GUJARAT 17). That was a case where an ex parte order was challenged before the High Court, but the High Court ultimately directed the trial Court to hear the objections of the defendant that may be filed in the trial Court and dispose of the application for temporary injunction.

12. I find that the grievance made on behalf of the appellants for the alleged non-compliance of Order 39, Rules 3 and 3-A has no substance and even the grievance made regarding non-disposal of the application for temporary injunction within 30 days is also devoid of any substance. Though the application was filed under Order 39, Rule 4, the appellants did not choose to file reply-affidavit on merits in the injunction application till 6th June, 2005 and instead of getting the injunction vacated on merits, made unsuccessful attempt to get the same vacated on technical grounds. The leaned Counsel appearing for the respondent states that though the application was filed under Order 39(4) of C.P.C. and the matter was attended by the appellants in the month of March, some excuses have been given for not filing the reply-affidavit in the injunction application. Even as regards the grievance that the application under Order 39, Rule 4 made by the appellants was not disposed of expeditiously, it is pointed out on behalf of the respondents that after the application was made on

3.3.2005 the Presiding Judge was transferred on 18.3.2005 and the new Presiding Judge was posted in that Court on 6.4.2005, which is not disputed on behalf of the appellants. On that very day the matter had appeared before the new Judge, when the parties sought time for filing written arguments. The written arguments were filed by the appellants on 11.4.2005 and by the plaintiffs on 15.4.2005 and, thereafter, the impugned order was passed on 6.6.2005.

13. In the aforesaid facts and circumstances, I find no substances in the appeal and the same is dismissed with costs. However, the hearing of the application for temporary injunction by the trial Court is expedited which shall be heard after considering the objections raised on behalf of the respondents/plaintiffs about the delay in filing the written statement by the appellants/defendants.

S.S. PARKAR, J.

ssm.